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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ANDREW ESPARZA, Defendant and Appellant.	E055493 (Super.Ct.No. SWF10001676) OPINION

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge. Affirmed as modified.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Robert Andrew Esparza of attempted voluntary manslaughter (count 1—Pen. Code, §§ 664, 192),[1] a lesser, necessarily included offense of the charged crime of attempted murder; shooting at an occupied vehicle (count 2—§ 246); unlawful possession of a firearm (count 3—§ 12021, subd. (a)(1)); and active participation in a criminal street gang (count 4—§ 186.22, subd. (a)). The jury additionally found defendant personally discharged a firearm in his commission of the count 1 offense (§§ 12022.53, subd. (c), 1192.7, subd. (c)(8)), personally used a firearm in his commission of the count 2 offense (§ 1192.7, subd. (c)(8)), and committed both the count 1 and 2 offenses for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)).

Defendant admitted suffering three prior strike convictions (§§ 667, subds. (c) & (e)(2)(a)), three prior serious felony convictions (§ 667, subd. (a)), and one prior prison term allegation (§ 667.5, subd. (a)). The court struck one of each of the prior strike and serious felony allegations. The court sentenced defendant to imprisonment for a five-year determinate term and an indeterminate term of 95 years to life.

On appeal, defendant contends (1) the court erred in failing to stay imposition of punishment on count 4 pursuant to section 654, (2) in not sua sponte instructing the jury on discharging a firearm in a grossly negligent manner as a lesser included offense of shooting at an occupied vehicle, (3) in not sua sponte instructing the jury on imperfect self-defense with respect to the count 2 offense, and (4) that defense counsel rendered

[1] All further statutory references are to the Penal Code unless otherwise indicated.

constitutionally ineffective assistance of counsel by not requesting both instructions. We agree the court erred in not staying imposition of the sentence on count 4 pursuant to section 654. We shall therefore modify the sentence imposed on count 4. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL HISTORY

The victim, an associate of the criminal street gang Elsinore Young Classics (EYC), lived with Eric Ibarra for two and a half years. At the time of trial, Ibarra was in jail charged with the murder of Taylor Vallin, a member of the criminal street gang Out Causing Panic (OCP) on April 30, 2010, for the benefit of, at the direction of, or in association with EYC. At a graduation party in June 2010, the victim engaged in a physical altercation with Clifford Sanders pertaining to a perceived insult to Ibarra. At the time of trial, Sanders had already pled guilty to attempted murder and admitted a gang enhancement with respect to the events in the instant case. OCP was allied with Elsinore Vato Locos (EVL). OCP's primary rival was EYC.

Sanders testified that on July 24, 2010, he received a text message about a party. He passed the text along to a number of people. Sanders received a reply from defendant, a member of OCP, asking Sanders to come pick him up. Sanders agreed and went to pick up both defendant and David Marquez, a member of EVL. Marquez testified that prior to them being picked up, defendant showed him what Marquez believed was a .357 revolver. When Sanders arrived, defendant brought out the gun and showed it around.

Sanders then left with Marquez and defendant to pick up Fernando Coria, another member of EVL. They drove to a friend's house and hung out on the sidewalk by

Sanders's car. Defendant showed Sanders the gun again. The victim drove by, revved his engine, and stared at them.[2] Marquez took the behavior as an attempt at intimidation; the others took it as a show of disrespect.

Defendant told Sanders to follow the victim; they all got in the vehicle and followed the victim. Sanders drove with defendant in the passenger seat; Coria and Marquez were in the back seat. Defendant told Sanders to speed up in order to catch up with the victim. They eventually caught up with the victim as he entered the parking lot of a park; Sanders parked parallel to the driveway to the park.

The victim exited the parking lot and accelerated toward Sanders's car. Defendant exited the car, moved to avoid being struck by the victim's car, and fired a shot.[3] The victim's vehicle swerved away to avoid colliding with Sanders's car; after passing Sanders's car, defendant fired another shot. The victim parked his car, exited, and sought help in a nearby home. Defendant reentered Sanders's vehicle. When Sanders testified a year earlier, prior to his plea agreement, he told an officer defendant had fired at the victim.

The victim testified he was on his way to a friend's house that evening; they were going to a party. On his way, he received either a call or text from his friend indicating his friend no longer wished to go. He turned his vehicle around to return home to get his

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[2] Sanders testified the victim owned a custom, modified Honda Civic that normally made a loud revving sound. He also testified the victim passed by slowly, made a U-turn, slowed down again while passing them, looked at them, and drove off.

[3] Sanders testified defendant exited the car before the victim exited the parking lot, stood in front of the victim's car, and fired one shot as the victim's car accelerated.

wallet. On both ways he passed by a group of men standing outside. He never revved his engine or stared the men down. He then drove to a park to smoke marijuana.

A man whom the victim recognized as someone who hung out with OCP members then got in front of his car in the middle of the street, raised a revolver, and pointed it at him. The man fired one shot. The victim then tried to hit the man with his car. The man fired at least one other shot. After the victim's vehicle passed the man, he heard another two gunshots. The victim received a grazing bullet wound to his back.

The victim was 80 percent sure defendant was the shooter. He recognized Sanders as the driver of the car out of which the shooter exited. The victim believed the shooting was in retaliation for the murder of Vallin.

The shooting left a bullet hole going through the rear quarter panel, rear door, and driver's seat of the victim's car. A bullet was found in the driver's seat.

DISCUSSION

A. SECTION 654

Defendant contends the court erred in failing to stay punishment on count 4 pursuant to section 654, because his conduct for that offense involved no separate objective or intent with regard to his commission of the count 1 through 3 offenses. The People concede the issue. We agree.

Where each of "'the underlying [felonies] were the act[s] that transformed mere gang membership—which, by itself, is not a crime—into the crime of gang participation[,]' . . . 'section 654 precludes multiple punishment for both (1) gang participation, one element of which requires that the defendant have "willfully

promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of th[e] gang," [citation] and (2) the underlying felony that is used to satisfy this element of gang participation.' [Citation.] Section 654 applies where the 'defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself.' [Citation.]" (*People v. Mesa* (2012) 54 Cal.4th 191, 197-198.)

Here, defendant was convicted of the underlying offenses in counts 1 through 3, which were used to support his conviction for the substantive gang offense in count 4. Thus, imposition of punishment for counts 1 through 3 and the count 4 offense is barred pursuant to section 654 because there was no separate intent or objective in committing the count 4 offense. Accordingly, defendant sentence of 25 years to life for the count 4 offense must be stayed.

B. INSTRUCTION ON LESSER INCLUDED OFFENSE OF DISCHARGING A FIREARM IN A NEGLIGENT MANNER

Defendant contends the court should have issued a sua sponte instruction to the jury on discharging a firearm in a negligent manner as a lesser, necessarily included offense for which he was convicted, shooting at an occupied vehicle. We disagree.

"[A] trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence. [Citation.] It is error for a trial court not to instruct on a lesser included offense when the evidence raises a question whether all of the elements of the charged offense were present, and the question is substantial enough

to merit consideration by the jury. [Citation.] When there is no evidence the offense committed was less than that charged, the trial court is not required to instruct on the lesser included offense. [Citation.]" (*People v. Booker* (2011) 51 Cal.4th 141, 181.)

The obligation to instruct on lesser included offenses arises even where inconsistent with the defense's theory of the case or where specifically objected to by the defense, so long as substantial evidence supports it. (*People v. Breverman* (1998) 19 Cal.4th 142, 159.) "[*E*]*very* lesser included offense, or theory thereof, which is supported by the evidence must be presented to the jury." (*Id*. at p. 155.) "On appeal, we review independently whether the trial court erred in failing to instruct on a lesser included offense. [Citation.]" (*People v. Booker*, *supra*, 51 Cal.4th at p. 181.)

Section 246.3, subdivision (a) provides: "Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense . . . ." "'Unlike section 246, section 246.3 does not require that an inhabited dwelling, occupied building, or any other specific target be in the defendant's firing range. But like section 246, section 246.3 involves discharge of a firearm under circumstances presenting a significant risk that personal injury or death will result. Section 246 proscribes discharging a firearm *at specific targets*, the act of which presumably presents a significant risk that personal injury or death will result. Section 246.3 proscribes discharging a firearm *in any grossly negligent manner* which presents a significant risk that personal injury or death will result. [¶] The only difference between sections 246 and 246.3 is that section 246 requires that a specific target (e.g., an inhabited dwelling or an occupied building) be in

the defendant's firing range. Section [246.3] does not include this requirement. Both crimes, however, involve the intentional discharge of a firearm in a grossly negligent manner which presents a significant risk that personal injury or death will result.' [Citation.]" (*People v. Ramirez* (2009) 45 Cal.4th 980, 986.)

The courts in *Ramirez* and *People v. Overman* (2005) 126 Cal.App.4th 1344 (Fourth Dist., Div. Two) (*Overman*), concluded that discharging a firearm in a negligent manner is a lesser, necessarily included offense of the offense of shooting at an inhabited dwelling. (*People v. Ramirez, supra*, 45 Cal.4th at p. 990; *Overman*, at pp. 1361-1362.) We find no reason to vary those holdings simply because they involved occupied buildings and the instant case involves an occupied vehicle.

Nonetheless, we find no evidence to support an instruction for discharging a firearm in a negligent manner in the instant case. On the contrary, the evidence in this case overwhelmingly establishes an intent to fire at the victim's occupied vehicle, if not the victim himself. Defendant ordered Sanders to follow the victim's vehicle. Defendant brought a gun with him. Defendant exited Sanders's car when they found the victim. Both the victim and Marquez testified defendant shot *at the victim*. The People adduced testimony that between two and four shots were fired. Defendant's shots hit the victim's vehicle and wounded the victim.

As this court noted in *Overman*, "'Section 246.3 was enacted in 1988, nearly 40 years after section 246, to address the 'growing number of urban California residents engaged in the dangerous practice of discharging firearms into the air during festive occasions.' [Citation.]" (*Overman, supra*, 126 Cal.App.4th p. 1361.) Here, defendant

was not festively firing his gun, but directing his fire at the victim inside the victim's vehicle.

Moreover, the People adduced ample evidence of defendant's intent in firing at the victim, not merely an intent of exercising gross negligence in the shooting. Defendant and the victim were members or associates of rival gangs. The victim was a former roommate of Ibarra who was on trial for the murder of Vallin, defendant's fellow gang member, with a gang enhancement allegation that the murder was for the benefit of, at the direction of, or in association with the victim's associated gang, EYC. The victim believed the shooting was in retaliation for the murder of Vallin. Only about a month earlier, the victim had engaged in a physical altercation with Sanders. Thus, the evidence overwhelmingly established an intent to shoot the victim, who was in his vehicle.

Defendant exposits *Overman* for the proposition that the facts of the instant case required instruction of the jury with the lesser included offense of discharging a firearm in a negligent manner. We find *Overman* distinguishable. In *Overman,* no one testified where the defendant was pointing his rifle at the time he fired it. (*Overman*, *supra,* 126 Cal.App.4th at pp. 1362-1363.) Here, Marquez and the victim testified defendant pointed the gun at the victim. In *Overman*, no bullet holes were found in any of the occupied buildings at which the defendant was charged with shooting. (*Id*. at p. 1363.) Here, one bullet pierced the rear quarter panel, rear door, and passenger seat of the victim's car. A bullet was found on the driver's seat of the victim's vehicle. In *Overman,* there was testimony the defendant was a marksman who, with the specific type of rifle he fired, could have hit anything at which he was aiming. Thus, the court concluded the jury

could have inferred defendant had fired his rifle away from occupied buildings because he had not hit any. (*Ibid*.) Here, there was no testimony defendant was a marksman. He fired at close range and struck both the victim and the victim's vehicle in as few as two shots. Thus, insufficient evidence supported instructing the jury with the lesser included offense of discharging a firearm in a negligent manner. Finally, for the reasons discussed above, any error was harmless. (*People v. Prince* (2007) 40 Cal.4th 1179, 1267.)

C. IMPERFECT SELF-DEFENSE

Defendant contends the court erroneously failed sua sponte to instruct the jury with CALCRIM No. 604, the instruction on imperfect self-defense, with respect to count 2, shooting at an occupied vehicle. We disagree.

The court is required sua sponte to give the instruction on imperfect self-defense where it finds the evidence sufficient to justify giving an instruction on the lesser included offense of voluntary manslaughter based upon imperfect self-defense. (*People v. Lopez* (2011) 199 Cal.App.4th 1297, 1304, fn. 35; *People v. Murtishaw* (2011) 51 Cal.4th 574, 594.) "Imperfect self-defense is the actual, but unreasonable, belief in the need to resort to self-defense to protect oneself from imminent peril. [Citations.]" (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1178.) The Court in *Murtishaw* "characterized unreasonable self-defense as a 'defense' such that an instruction on voluntary manslaughter based on this theory was required only if requested or, sua sponte only, '"if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such . . . a defense and the defense is not inconsistent with the defendant's theory of the case."' [Citation.]" (*Murtishaw*, at p. 594.)

Imperfect self-defense is "not a true defense; rather, it is a shorthand description of one form of voluntary manslaughter. And voluntary manslaughter, whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder." (*People v. Barton* (1995) 12 Cal.4th 186, 200-201; *People v. Michaels* (2002) 28 Cal.4th 486, 529 ["imperfect self-defense is not an affirmative defense, but a description of one type of voluntary manslaughter"]; *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1166.)

The majority of published decisions that have addressed this or similar issues have concluded imperfect self-defense is a theory that negates the malice aforethought intent required of murder; thus, an instruction on imperfect self-defense is appropriate only where a defendant is charged with murder and the evidence is sufficient to support instruction on the lesser included offense of voluntary manslaughter. (*People v. Watie* (2002) 100 Cal.App.4th 866, 882 [court had no sua sponte duty to instruct jury with the "defense" of unreasonable self-defense because imperfect defense was not a defense, but a species of voluntary manslaughter]; *People v. Quintero*, *supra*, 135 Cal.App.4th at p. 1167 [imperfect self-defense not applicable to offense of aggravated mayhem]; *People v. Hayes* (2004) 120 Cal.App.4th 796, 801-805 [imperfect self-defense applies only to "malice aforethought," not the more general malice applicable to charge of mayhem]; *People v. Szadiewicz* (2008) 161 Cal.App.4th 823, 836 [theory of imperfect self-defense does not apply to charge of aggravated mayhem]; *People v. Sekona* (1994) 27 Cal.App.4th 443, 452-457 [imperfect self-defense applies only to "malice aforethought,"

not mental state of "malice"]; *People v. Watie, supra,* 100 Cal.App.4th at p. 882 [imperfect self-defense not a defense, but a species of voluntary manslaughter].)

In other words, because the jury was not asked to find defendant harbored "malice aforethought" in his shooting at an occupied vehicle, instruction with CALCRIM No. 604 would have been inappropriate. "[M]alice aforethought reflects or embodies a realization by the actor that his or her conduct *violates social expectations.* It is this realization that cannot be reconciled with an actor's belief that he or she is acting in self-defense, because society approves the reasonable use of force to that end. [¶] This rationale cannot be extended to the more general concept of "malice" as defined in section 7 and incorporated in the statutory definition of mayhem. That definition connotes no element of knowing violation of social norms. It requires only intent to vex, injure, or annoy." (*People v. Hayes* (2004) 120 Cal.App.4th 796, 803, fn. omitted.) Shooting at an occupied vehicle requires only the general concept of malice as defined in section 7; therefore, instruction with imperfect self-defense would have been inappropriate.

Defendant expounds two cases in support of his contention the court should have instructed the jury with CALCRIM No. 604 with respect to count 2. Both are distinguishable. In *People v. Wells* (1949) 33 Cal.2d 330, the court held it was error for the trial court to exclude evidence the defendant had acted with the unreasonable belief in the need for self-defense where defendant was charged with committing the capital offense of assault by an inmate of prison guards with malice aforethought. (*Id*. at pp. 344-359, overruled on another ground in *People v. Wetmore* (1978) 22 Cal.3d 318.) First, *Wells* was concerned with exclusion of evidence, not jury instruction. Here, we are

concerned with instruction of the jury. The trial court in the instant case did not exclude evidence defendant acted with the unreasonable belief in the need for self-defense. Second, the crime in *Wells* required malice aforethought. The instant crime of shooting at an occupied vehicle requires only general malice. Third, *Wells* found the exclusion of evidence harmless. Thus, *Wells* does not support defendant's contention that the court's failure to instruct the jury with CALCRIM No. 604 resulted in reversible error.

In *People v. McKelvy* (1987) 194 Cal.App.3d 694, the court posited "a trial court should instruct sua sponte that an honest but unreasonable belief rule in the need for self-defense negates the malice required for a conviction of mayhem in cases where there is more than minimal and insubstantial evidence of self-defense; the defendant is relying upon such a defense or the defense is not inconsistent with the defendant's theory of the case; there is evidence to support a conviction of lesser included offenses; and the jury is instructed on such offenses." (*Id*. at p. 704 (lead opn. of Kline, P.J.).) However, as noted by other courts that have considered the matter, Presiding Justice Kline's opinion was not joined by either of the concurring justices. (*People v. Quintero*, *supra*, 135 Cal.App.4th at p. 1167 [recognizing *McKelvy* was dictum supported only by one justice in which the other two justices concurred only in the result]; *People v. Hayes*, *supra*, 120 Cal.App.4th at pp. 801-805 [same]; *People v. Sekona*, *supra*, 27 Cal.App.4th at p. 451 [same].) Thus, *McKelvy's* supposition is, at best, dictum for defendant's position and, at worst, commensurate with a statement in dissenting opinion. We elect to follow the majority line of cases discussed above and not the "holding" in *McKelvy's* lead opinion. Moreover, defendant fired at least one shot when the victim's vehicle had already passed

him. Thus, the victim posed no threat to defendant such that not even imperfect self-defense would be factually applicable if legally appropriate. No instruction on imperfect self-defense was required.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Because we have not found defendant forfeited the instructional issues raised herein and have rejected those contentions on their merits, we need not address his argument defense counsel below was constitutionally ineffective for not requesting the instructions.

DISPOSITION

The judgment is modified such that the sentence on count 4 shall be stayed pursuant to section 654. As modified, the judgment is affirmed. The trial court is directed to prepare an amended minute order and abstract of judgment reflecting the modifications. The trial court is further directed to forward a copy of the minute order reflecting the court's modification of the judgment and the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.